BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH J. RIDER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,020,037
HALLMARK CARDS, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the July 18, 2006 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for a 10 percent permanent partial disability to the right forearm for the injuries suffered on April 21, 2004. The Appeals Board (Board) heard oral argument on November 7, 2006.

APPEARANCES

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent appeared by its attorney, Gregory D. Worth of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

ISSUES

1. Did claimant meet with personal injury by accident arising out of and in the course of her employment with respondent?

2. What is the nature and extent of claimant's injuries and disability?

3. Did claimant provide timely written claim to respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

As of the date of the regular hearing, claimant had worked for respondent for nearly 22 years as a film over-wrap operator. On April 21, 2004, she was bowing stock while working as a bowing stuffer. She had been performing these duties for about 20 minutes when, as she bowed the stock to make it go through the machine better, she experienced a sudden onset of pain in her right wrist. Approximately 5 days later, claimant reported this injury to her supervisor, Brett Young. At some point, claimant was placed on light duty and continued working for respondent until July 26, 2004, when she was taken off work.

Claimant ultimately came under the care of board certified plastic surgeon O. Allen Guinn, III, M.D., on August 5, 2004. Claimant advised Dr. Guinn that she suffered a pop in her wrist on April 21, 2004, and has shown no improvement since that date. Dr. Guinn performed an arthroscopic examination of claimant's wrist on September 20, 2004, diagnosing a significant tear of the ligament connecting the scaphoid to the lunate and a tear of the ligament connecting the lunate with the adjacent bone on the other side, called the triquetrum. This damage was noted by Dr. Guinn, but not repaired. Open surgery to repair the damage was recommended by Dr. Guinn at the September 23, 2004 examination. This was the last time claimant was examined by Dr. Guinn.

Claimant sought a second opinion regarding the suggested surgery, ultimately coming under the care of board certified plastic surgeon Lynn D. Ketchum, M.D. Dr. Ketchum first examined claimant on July 5, 2005, at which time he diagnosed a tear of the triangle fibrocartilage and a tear of the scapholunate ligament. Surgery to repair the damage was performed by Dr. Ketchum on September 26, 2005. Dr. Ketchum treated claimant until January 9, 2006, at which time claimant was released with a 10 percent impairment of the right wrist pursuant to the fourth edition of the AMA *Guides*.[1] Dr. Ketchum testified that a ligament tear is frequently associated with a "pop". He also testified that at the last examination, claimant had full range of motion, full strength and full sensation in the right wrist. He did acknowledge that the scapholunate would stretch with time and possibly create future problems.

Dr. Ketchum was shown a videotape of claimant's job. He testified that the duties depicted on the video were not sufficient to cause the injuries suffered by claimant. However, he also testified on redirect, that the job described to him by claimant would be sufficient to cause the injuries diagnosed and treated. As noted in the Award, the video was not placed into the record in this matter. There is no indication that claimant or any representative of respondent viewed the video for accuracy.

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant's history is significant in that she had a serious injury to her right wrist in 1998 while playing softball. Claimant underwent surgery at that time under the care of Mary Ann Hoffmann, M.D.

Claimant was referred by her attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., for an examination on December 30, 2005. Dr. Prostic noted the prior surgeries by Dr. Guinn, Dr. Hoffmann and Dr. Ketchum. Dr. Prostic found claimant to have full range of motion, with some tenderness. Her grip strength, pinch strength and sensation were within normal limits. He was advised of claimant's prior softball injury to her right wrist in 1998, but was advised that claimant was asymptomatic before the April 21, 2004 injury. Dr. Prostic rated claimant at 20 percent to the right forearm. But he acknowledged that in his opinion, the fourth edition of the AMA *Guides*[2] did not cover this condition and the rating was his personal estimate.

Claimant was referred by respondent to board certified occupational and preventative medicine expert Michael J. Poppa, D.O., for an examination on April 27, 2006. After noting the prior surgeries, Dr. Poppa examined claimant, finding all tests performed to be normal. Dr. Poppa assessed claimant a 5 percent impairment to the right wrist, but acknowledged that if the range of motion section from the fourth edition of the AMA *Guides* was used, claimant's impairment would be zero percent. Dr. Poppa also noted that Dr. Hoffmann mentioned in her medical records she had viewed the video of claimant's job, finding the duties depicted on the video would not be sufficient to cause the injuries suffered by claimant.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[5]

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[2] AMA *Guides* (4th ed.).

[3] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[7]

Injury or personal injury has been defined to mean,

> . . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.[8]

Respondent argues that claimant failed to prove that she suffered accidental injury arising out of and in the course of her employment. Claimant's testimony as to how the accident happened is uncontradicted.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[9]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[10]

Respondent claims the medical testimony supports its claim that the video of claimant's job convinced the doctors that claimant's job activities are not sufficient to cause the injuries suffered. However, Dr. Ketchum testified that claimant's description of her job duties describes sufficient activity to have caused the injuries suffered. The video in question is not in the record. Additionally, no person testified as to the accuracy of the

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[6] K.S.A. 44-501(a).

[7] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[8] K.S.A. 2003 Supp. 44-508(e).

[9] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[10] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

job portrayed on the video. The Board finds that claimant has proven that she suffered an accidental injury arising out of and in the course of her employment with respondent.

> No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation. . . .[11]

Claimant was paid temporary total disability compensation from July 21, 2004, until December 4, 2005. The parties have stipulated that written claim was submitted in this matter on November 15, 2004, during which time claimant was receiving both temporary total disability and authorized medical treatment with Dr. Guinn. November 15, 2004 is within 200 days of claimant's receipt of compensation. Therefore, the requirements of K.S.A. 44-520a have been satisfied.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[12]

The ALJ found that claimant had suffered a 10 percent impairment to the right forearm. After considering the opinions of the various health care providers, the Board concurs with that finding. Dr. Prostic found a 20 percent impairment, but acknowledged that his opinion was not pursuant to the fourth edition of the AMA *Guides*, even though K.S.A. 44-510e requires its use. Dr. Prostic testified that claimant's condition is not covered by the AMA *Guides*. But Dr. Guinn, Dr. Ketchum and Dr. Poppa were all able to rate claimant's condition using the *Guides*. Therefore, Dr. Prostic's opinion will not be considered.

Dr. Guinn did not rate claimant, as he did not have the opportunity to examine her after the surgeries performed by Dr. Ketchum. Dr. Poppa only examined claimant on one occasion and assessed a 5 percent impairment for claimant's wrist injury. Dr. Poppa testified that with the normal test findings, claimant would have a zero percent impairment pursuant to the AMA *Guides*.

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[11] K.S.A. 44-520a(a).

[12] K.S.A. 44-510e(a).

Dr. Ketchum, claimant's treating physician, testified that claimant had a 10 percent impairment pursuant to the fourth edition of the AMA *Guides* for the scaphoid ligament tear. He noted that added impairment may be possible from the triangular fibrocartilage injury, but was unable to testify as to the extent of any increase from the original surgery with Dr. Hoffmann from the 1998 injury. Therefore, the only proven impairment from this injury is Dr. Ketchum's 10 percent to the right upper extremity as awarded by the ALJ. The Board affirms the ALJ's findings in this matter.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated July 18, 2006, should be, and is hereby, affirmed.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[13]

IT IS SO ORDERED.

Dated this ____ day of November, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[13] K.S.A. 44-536(b).